1-9-2014

# Brown v. Greenheart Respondent's Brief Dckt. 41189

# In the Supreme Court of the State of Idaho

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| JAY BROWN and CHRISTINE HOPSON-BROWN, Husband and Wife,<br><br>Plaintiffs-Respondents,<br>v.<br><br>AUGUSTA SAYOKO MIMOTO GREENHEART, an individual,<br><br>Defendant-Appellant. | Docket No. 41189-2013 |

## BRIEF OF RESPONDENTS

**Appeal from the District Court of the Fourth Judicial District of The State of Idaho, in and for the County of Elmore, Honorable Lynn G. Norton, District Judge, Presiding**


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## STATEMENT OF THE CASE

This is Plaintiffs-Respondents Jay Brown and Christine Hopson-Brown (the "Browns") brief responding to the *Opening Brief* filed by Defendant-Appellant Augusta Sayoto Mimoto Greenheart ("Greenheart"). Greenheart's appeal of the District Court's *Final Judgment* in favor of the Browns should be dismissed and/or the *Final Judgment* affirmed because (a) Greenheart failed to challenge quasi- estoppel and waiver—both independent grounds supporting the *Final Judgment*; and (b) Greenheart raises no valid grounds to overturn the *Final Judgment* with respect to the issue of mutual mistake or her statute of limitations defense.

### I. NATURE OF THE CASE

The question in this case involves the effect of using a general "together with appurtenances" clause in a deed conveying real property where the evidence shows that no water was used on the property and the parties intended that the property would be conveyed without water rights.

The *Final Judgment* ruled for the Browns on all counts and claims for relief in their Complaint to quiet title to portions of two ground water rights (the "Water Rights"). The Water Rights were partially decreed in 2002 in the Snake River Basin Adjudication ("SRBA") with a 320-acre "permissible place of use" that included sixty acres of non-irrigated desert land in Elmore County.

The issue at trial was whether there was a mutual mistake in the parties' use of a 2007 form warranty deed to convey the sixty acre parcel (hereinafter the "Greenheart Property") from the Browns to Greenheart. The deed included a general "with their appurtenances" clause but

made no mention of water or water rights.

Following trial, the District Court concluded that:

1) to the extent the general appurtenancy clause in the warranty deed operated to pass portions of the Water Rights with the land, it represented a material mutual mistake of the parties, R. Vol. III, p. 555, and the deed would be reformed to reflect their true intent that no water rights were to pass. R. Vol. III, p. 562;

2) Greenheart was estopped from asserting ownership of the Water Rights because of, among other things, her representations to Elmore County officials in 2007 and 2009 that she knew when she purchased the land that it was dry and lacked an irrigation system or water rights. R. Vol. III, p. 560; and

3) to the extent that the warranty deed operated to convey water rights to Greenheart, she nevertheless relinquished them by waiver because she sought and obtained the Browns' assistance in asserting to Elmore County officials that she did not have water rights and because the Browns relied on Greenheart's assertions to the County when the Browns contracted to sell the Water Rights to the City of Mountain Home. R. Vol. III, p. 561-562.

The District Court also found the Browns to be the prevailing party, R. Vol. III, p. 563, and awarded the Browns attorney fees and costs. R. Vol. III, p. 609-624.

## II. COURSE OF PROCEEDINGS

The Brown's quiet title Complaint was filed April 5, 2012 shortly after the Browns learned that Greenheart had filed a Notice of Change of Ownership with IDWR on February 17, 2012 asserting that she owned the Water Rights. R. Vol. I, p. 11; Plaintiffs' Exhibit 29. Count 1

of the Complaint sought a declaratory judgment that the Browns owned the Water Rights because any presumption that the Water Rights passed under the general appurtenancy clause in the deed was rebutted by facts clearly demonstrating that both parties did not intend to convey any such Water Rights. R. Vol. 1, p. 17-18. Count 2 of the Complaint sought a declaratory judgment quieting title to the Browns under the principles of promissory estoppel, quasi-estoppel and/or waiver. R. Vol. I, p. 18-20. Paragraph 18 of the Complaint alleged that under Idaho law, a deed including a general appurtenance clause is presumed to convey appurtenant water rights unless it can be clearly shown that both parties knew that the water rights were not intended to be conveyed. R. Vol., I, p. 15, *citing Russell v. Irish*, 20 Idaho 194, 198, 118 P. 1031 (1911). Paragraph 19 of the Complaint contained eleven specific allegations of fact (supported by attached exhibits) demonstrating, *inter alia*, that at the time of contracting for the sale and the delivery of the deed conveying the Greenheart Property, the Browns and Greenheart each understood that the sixty acres were dry land and were being sold without any water rights. R. Vol. I, p. 14-15.

The Complaint sought attorney fees pursuant to the attorney fee provision of the parties' purchase and sale agreement, Idaho Code Section 12-120(3) and Idaho Rules of Civil Procedure 54(d) and 54(e). In addition to requesting a judgment declaring that the Browns were the unqualified owners of the Water Rights, the Complaint also requested "such other and further relief as this Court may deem appropriate in the premises." R. Vol. I, p. 21.

Greenheart's Answer asserted affirmative defenses including statute of limitations, laches, merger, waiver, estoppel, the parol evidence rule, and unclean hands. R. Vol. I, p. 7-8.

The Browns moved for summary judgment on each of their quiet title claims. R. Vol. I, p. 122. Relying on a line of Idaho decisions stretching from 1911 to 2010,[1] the Browns argued that the Water Rights were not appurtenant to the Greenheart Property, and in any event, clear evidence showed that no water rights were intended to be conveyed. R. Vol. I, p. 135-37. In response, Greenheart also moved for summary judgment, arguing that the Browns' claims were barred by one or more statutes of limitation. R. Vol. I, p. 100. Greenheart's response included a motion to strike portions of affidavits submitted by the Browns in support of their *Motion for Summary Judgment*, arguing that the warranty deed delivered to Greenheart was unambiguous on its face, and therefore, the Court's consideration of the facts alleged in the affidavits concerning the parties' conduct and knowledge about the Water Rights leading up to and after delivery of the warranty deed violated the parol evidence rule. R. Vol. II, p. 322-24.

The District Court denied Greenheart's *Motion for Summary Judgment* on her statute of limitations defense, holding that the Browns' quiet title action accrued on February 12, 2012

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[1] *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911) (a deed conveying land "together with appurtenances" carries with it the water right appurtenant at the time of the conveyance "unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed); *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933) (water rights "pass with land though not mentioned as such or as appurtenances[,] . . . unless it affirmatively appears to the contrary directly or by implication"); *Koon v. Empey*, 40 Idaho 6, 231 P. 1097 (1924) (in the absence of fraud or mistake or a reservation to the contrary, a deed conveying real property with the "usual appurtenance" clause effects a transfer of appurtenant water rights); *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972 (2010) ("Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention 'appurtenances'") (citing *Joyce Livestock Co. v. United States*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007)(emphasis added).

when Greenheart first asserted an adverse claim to the Water Rights by filing the Notice of Change of Ownership of the Water Rights with IDWR. R. Vol. II, p. 371-72. The Court also denied Greenheart's *Motion to Strike*, holding that under *Koon v. Empey*, 40 Idaho 6, 231 P. 1097 (1924) even a deed appearing unambiguous on its face may be challenged with extrinsic evidence where the issue of fraud or mistake is presented. R. Vol. II, p. 372.

Specifically, the District Court stated that the general appurtenancy clause in the warranty deed operated to convey a proportionate amount of the two Water Rights,[2] but that "[t]he pleadings in this case and evidence in support of the motions for summary judgment raise the issue of mistake which would permit extrinsic evidence to be considered." R. Vol. II, p. 375 *citing Collins v. Parkinson*, 96 Idaho 294, 527 P.2d 1252 (1974). The District Court denied summary judgment to both parties concerning ownership of the Water Rights and designated the issue of whether a mutual mistake existed as a factual issue for trial. *Id.*

Prior to trial, Greenheart sought reconsideration of the Court's determination to try the issue of mutual mistake, arguing that "mistake" had not been pled in the Complaint. The Browns filed a *Motion to Amend* their *Complaint* to add the following additional language to Paragraph 27:

> The facts and circumstances of the transaction and the parties' prior, contemporaneous and subsequent conduct, among other things, create an

[2] The District Court determined that the portion of Water Rights 61-7151 and 61-2188 that should be deemed conveyed by the warranty deed (absent fraud or mistake) was 18.75 percent of each Water Right or the portion appurtenant to a total of 53.8125 acres. This was consistent with the way IDWR had calculated the portions and amounted to 23 acres of water from 61-7151 (renumbered by IDWR as 61-12272), and 30.8 acres of water from 61-2188 renumbered by IDWR as 61-12273) respectively. R. Vol. I, p. 57-62.

> issue of mutual mistake and allow the court to consider the extrinsic evidence described in this Complaint for the purpose of reforming the Warranty Deed to reflect the parties' mutual intent that no water rights were to be conveyed.

R. Vol. II, p. 417. The *Motion to Amend* also proposed a request for judgment declaring that the warranty deed be reformed to reflect that no water rights were conveyed. *Id.*, p. 418. At the pre-trial conference, the District Court denied Greenheart's *Motion for Reconsideration* and the Browns' *Motion to Amend* because the Court concluded that "mistake" had been sufficiently pled in the original Complaint. Tr., p. 55, l. 15-22; p. 56, l. 20 – p. 57, l. 4.

Following trial, the Court concluded that clear and convincing evidence showed an unintentional, common and material mistake was made by the parties in using a deed containing unqualified general appurtenancy language. R. Vol. III., pp. 550-59. The District Court also concluded that the evidence proved the Browns were entitled to the equitable relief requested in Count 2 of their *Complaint* – Quasi-Estoppel and Waiver. The *Final Judgment* entered May 23, 2013 reformed the warranty deed to specifically exclude and reserve the Water Rights to the Browns. *Id.*, p. 566.

Significantly, Greenheart has not appealed the District Court's decision that the Browns are entitled to the equitable relief requested in Count 2 of their *Complaint* – Quasi-Estoppel and Waiver. Greenheart's appeal focuses exclusively on whether mutual mistake could be tried based on the allegations presented in the *Complaint*, whether the *Complaint* was time-barred, and whether the Browns were entitled to an award of their attorney fees and costs. R. Vol. III, p. 603—*Notice of Appeal*; Appellant's *Opening Brief* at 7.

## III. STATEMENT OF FACTS

In February of 1988 the Browns purchased approximately 320 acres of land in Elmore County ("Original Brown Property"). Tr. p. 103, l. 19. Two ground water rights licensed for irrigation were claimed, and ultimately confirmed, for the Original Brown Property by two "partial decrees" in the Snake River Basin Adjudication ("SRBA"). Plaintiffs' Exhibits 2 and 3. Water Right 61-2188 authorized irrigation of up to 164 acres within a 320-acre permissible place of use ("PPU") that encompassed all of the Original Brown Property. Plaintiffs' Exhibit 2. Water Right 61-7151 authorized irrigation of up to 123 acres within the same PPU. Plaintiffs' Exhibit 3. Although the two partial decrees authorized use of ground water anywhere within the 320 acre PPU, no water under either Water Right had been diverted to irrigate any portion of the Greenheart Property since at least 1986. R. Vol. III, p. 539; Affidavit of Jay B. Brown; R. Vol. I, p.144.

In August of 2003, the Browns applied to IDWR to lease portions of each of these decreed rights (totaling 160 irrigated acres) to the Idaho Water Resource Board ("IWRB") Water Supply Bank. The Browns contracted to idle 160 acres of the 287 authorized acres from irrigation. Plaintiffs' Exhibits 27, 31, 33 and 34, R. Vol. III, p. 539. The Water Supply Bank lease between the Browns and the IWRB was in effect when the Complaint was filed. *Id.*

Contemplating selling the Greenheart Property, Jay Brown told his real estate agent, Darryl Rhead, that the property was being sold without water rights. Tr. p. 126, l 14-16. At that time the Browns were under an existing contract, executed in mid-2006, to sell portions of the

Water Rights sufficient to irrigate up to 272 of the 287 authorized acres to the Idaho Water Company. That contract remained in effect until it was terminated in 2009. R. Vol. III, p. 539.

During negotiations concerning sale of the Greenheart Property, Mr. Rhead represented to Greenheart that the Greenheart Property was "dry." Tr., p. 200. Mr. Rhead also told Greenheart she could drill a well on the property if she chose to. Tr., p. 201, l. 2-5. The agent's listing agreement, which Greenheart admitted she had reviewed, indicated there was no irrigation and no irrigation district, water delivery or water shares associated with the offered property. Plaintiffs' Exhibit 5.

The Browns and Greenheart entered into a Vacant Land Real Estate Purchase and Sale Agreement ("PSA") in January of 2007. Paragraph 6.E. of the PSA states under "Utilities, Improvements & Other Rights" that "Seller represents that the property does have the following utilities, improvements, services and other rights available (describe availability):" at which point "N/A" was entered. *Id.* Paragraph 16 of the PSA states:

> 16. WATER RIGHTS: Description of water rights, water systems, wells, springs, water, ditches, ditch rights, etc., if any that are appurtenant thereto that are now on or used in connection with the premises and shall be included in the sale unless otherwise provided herein: [left blank].

*Id.*

The PSA was accompanied by a seller's property disclosure ("Disclosure") that Greenheart acknowledged she reviewed. Plaintiffs' Exhibit 4. On the second page of the Disclosure, in the section entitled "Irrigation water provided by:" the Browns indicated "N/A." *Id.*

The PSA also included an attorney fee provision entitling the prevailing party in an action "in any way connected with this Agreement" to recover their reasonable costs and attorney fees, including costs and fees incurred on appeal. Plaintiffs' Exhibit 6, Section 9.

At the time of the January 2007 closing there was no system in place on the Greenheart Property to divert or distribute irrigation water. R. Vol.III, p. 539-540; Plaintiffs' Exhibits 44, 45 and 46.

At the closing on January 29, 2007, the Browns executed and delivered a form warranty deed prepared by the title company conveying the Greenheart Property to Greenheart. The warranty deed included no mention of water rights generally or the Water Rights in particular, but included the language "with their appurtenances" in the habendum clause. Plaintiffs' Exhibit 8.

After closing, Greenheart received a tax notice from Elmore County. In response, Greenheart submitted a June 10, 2007 Notice of Appeal to the Elmore County Board of Equalization ("Equalization Board") wherein she challenged the classification of the Greenheart Property as irrigated agriculture and sought to have it reclassified as Category 5—Dry Grazing. In her Notice of Appeal, Greenheart stated that when she purchased the land she had been told "that the land is dry." Plaintiff's Exhibits 17. On July 2, 2007, she restated her understanding that the land was "dry" when purchased. Plaintiffs' Exhibit 21.

On July 6, 2007 with Greenheart's express written authorization, Tr., p. 255, l. 13 – p. 256, l. 2, Jay Brown appeared before the Equalization Board on her behalf and represented that

> [The Greenheart Property] has no water right with the Idaho Water Resources. It was strictly for dry grazing. Ms. Greenheart's tax levy indicates that the property is irrigated; however, the property is not and will not be irrigated unless at such time a water right is purchased for the property by Ms. Greenheart.

Plaintiff's Exhibit 16. Greenheart was aware of and did not object to these statements. Tr. p. 256, l. 20-25. Jay Brown believed the above statement was true when made. Tr. p. 148, l. 23 – p. 149, l. 9. The Equalization Board granted Greenheart's request and made an adjustment "back to dry grazing." Plaintiff's Exhibit 22, p. 2. This reclassification reduced Greenheart's property tax liability by more than $600 per year. R., Vol. III, p. 548; Tr. p. 263, l. 4-19.

Greenheart also drafted and presented to the Browns a five-year "Dry Grazing Land Lease Agreement" allowing the Browns, as lessees, to use the Greenheart Property for "no other use but for dry grazing." Plaintiff's Trial Exhibit 11, Tr. p. 149, l. 24 – p. 151, l. 17. The executed Lease was provided to the County Assessor, Terri Hughes. Tr. p. 264, l. 2-20. By its terms, the Lease remained in effect until January 31, 2012.

Sometime later, an issue arose between the Browns and Elmore County over the propriety of the original split of the Greenheart Property. As part of the settlement of that dispute, Elmore County offered to purchase the Greenheart Property. In a November 8, 2009 e-mail to an Elmore County employee, Greenheart rejected the County's offer stating that "at the time of the purchase, I also was very aware that the parcel is dry grazing only due to lack of an irrigation system and no water rights." Plaintiff's Trial Exhibit 28; Tr. p. 22 – p. 267, l. 13; R. Vol. III, p. 548.

In early February 2012, the Browns were negotiating an agreement to sell all of Water Rights 61-2188 and 61-7151 to the City of Mountain Home. The Browns spoke with legal counsel regarding the potential sale, and in these discussions they first learned that the general appurtenance clause in the warranty deed created an uncertainty as to whether the deed also conveyed water rights. Tr. p. 137, l. 13 – p. 139, l. 25; R. Vol. II, p. 548-49.

On February 8, 2012 Jay Brown contacted Greenheart by telephone, and told her that he had recently learned that "back when the sale took place that there was a mistake made, that the water rights were transferred by mistake." Tr. p. 140, l. 1-21. He asked Greenheart to confirm that she did not claim any interest in the Water Rights.

On February 17, 2012, without notice to the Browns, Greenheart filed a Notice of Change of Water Right Ownership with IDWR accompanied by a copy of the warranty deed. R. Vol. I, p. 45-46; Plaintiff's Exhibit 29. This notice was the first instance since the closing in 2007 that Greenheart had asserted any interest in the Water Rights.

On March 23, 2012, the Browns received notice that IDWR had revised its water right database to show Greenheart as the current owner of portions of the Water Rights, and had reduced the quantity of water and irrigated acres authorized under the Water Rights in the Browns' name. The notice states that the changes were based on information submitted to IDWR by the person filing the Change of Ownership form but that IDWR did not determine legal ownership of the Water Rights. R. Vol. I, p. 47-54; Plaintiffs' Exhibit 30.

The Browns filed their Complaint on April 5, 2012.

## ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Whether the Browns are entitled to their attorney fees and costs below under the attorney fee provision of their Purchase and Sale Agreement with Greenheart.

2. Whether the Browns are entitled to their attorney fees and costs on appeal.

## ATTORNEY FEES ON APPEAL

The Browns request that they be awarded their attorney fees on appeal pursuant to Idaho Appellate Rule 41, I.R.C.P. 54(d) and (e), Idaho Code Section 12-120(3), Idaho Code Section 12-121, and Section 9 of the PSA between the Browns and Greenheart. This issue will be discussed in more depth in Section IX herein.

## ARGUMENT

### I. STANDARD OF REVIEW

Greenheart designates several issues for review on appeal. App. Brief at 7. The appropriate standard of review differs for each designated issue.

Greenheart first challenges the District Court's holding concerning the sufficiency of the Browns' pleadings under Rule 9(b), I.R.C.P. "When [the Supreme] Court considers the question of whether a claim for relief has been stated, the record must be considered in a light most favorable to the non-moving party." *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 106 P.3d 449 (2005) (citations omitted). Under I.R.C.P. 8(a), a pleading must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief' and a demand for relief." *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346, 1347 (1992) (citing Idaho R. Civ. Proc 8(a)(1)-(2)). "[P]leadings should be liberally construed in the interest of securing 'a just, speedy and inexpensive resolution of the case.'" *Brown v. City of Pocatello,* 148 Idaho 802, 229 P.3d

1164, 1169 (2010). The Court makes "every intendment to sustain a [pleading] that is defective, e.g., wrongly captioned or inartful ... The key issue in determining the validity of a [pleading] is whether the adverse party is put on notice of the claims brought against it." *Id.*

Greenheart also challenges the District Court's findings and conclusions concerning when the Browns' cause of action accrued under the applicable statute of limitations. App. Brief at 7. "[W]here discovery of a cause of action commences the statute of limitations the date of discovery is a fact question for the jury unless there is no evidence creating a question of fact." *McCoy v. Lyons*, 120 Idaho 765, 773, 820 P.2d 360, 368 (1991). "A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. When deciding whether findings of fact are clearly erroneous, [the] Court does not substitute its view of the facts for that of the trial court." *Thomas v. Madsen*, 142 Idaho 635, 637, 132 P.3d 392, 394 (2006) (citation omitted). "It is the province of the trial court to determine ... the inferences to be drawn from the evidence." *KMST, LLC v. County of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003).

Greenheart also appeals from the District Court's determination that the PSA was ambiguous. "Whether an ambiguity exists in a legal instrument is a question of law, over which [the] Court exercises free review." *Knipe Land Company v. Robertson*, 151 Idaho 449, 259 P.3d 595 (2011) (citing *Cool v. Mountainview Landowners Coop. Ass'n*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2005)) "Where a legal instrument is found to be unambiguous the legal effect must be decided by the district court as a matter of law; it is only when that instrument is found to be ambiguous that evidence as to the meaning of that instrument may be submitted to the finder of fact." *Id.*

Greenheart also seeks review of the District Court's award of costs and attorney fees under statute. "Interpreting statutes is a question of law, over which [the] Court exercises free review." *Purco Fleet Services, Inc. v. Idaho State Dept. of Finance*, 140 Idaho 121, 124, 90 P.3d 346, 349 (2004) (citations omitted).

With respect to the underlying issue of mutual mistake in this case, mutual mistake is a question of fact which must be proven by clear and convincing evidence, and the trial court's findings will not be overturned unless clearly erroneous. *Cline v. Hoyle & Assoc., Inc.*, 108 Idaho 162, 164, 697 P.2d 1176, 1178 (1985).

## II. GREENHEART HAS NOT APPEALED THE JUDGMENT ON COUNT TWO OF THE BROWNS' COMPLAINT.

Greenheart has not appealed the District Court's decision that the Browns are entitled to equitable relief on Count Two of their Complaint – "Quiet Title/Declaratory Judgment-Estoppel." Nor has Greenheart included this issue in her *Opening Brief* or submitted argument or authority for overturning the District Court's disposition of Count Two in the Browns' favor. R. Vol. III, p. 603—Notice of Appeal; Appellant's *Opening Brief* at 7.

Unless Greenheart prevails on her statute of limitations defense as it may apply to Count Two, this Court need not reach the issue of whether the District Court erred in allowing the case to proceed on the issue of mutual mistake. *See Anderson v. Professional Escrow Services, Inc.*, 141 Idaho 743, 118 P.3d 75 (2005); *Campbell v. Kvamme*, Idaho Supreme Court Dkt. No. 39650 at *5 (Dec. 31, 2013) ("Where a trial court grants summary judgment on two independent grounds and the appellant challenges only one of those grounds on appeal, the judgment must be

affirmed. We will not even consider the ground that is challenged on appeal."); *Kugler v. Drown*, 119 Idaho 687, 691, 809 P.2d 1166, 1170 (Ct.App.1991) (appellant's failure to include issue in the statement of issues required by I.A.R. 35(a)(4) eliminates consideration of the issue on appeal); *Everhart v. Washington County Rd. and Bridge Dep't*, 130 Idaho 273, 274, 939 P.2d 849, 850 (1997) (issue not raised in statement of issues or argued in briefing with citations to authority will not be considered on appeal).

In Count Two of their Complaint, the Browns incorporated all prior allegations, including facts summarized above concerning 1) the circumstances in which the parties entered into their negotiations and their PSA; 2) the nature of the Greenheart Property; 3) the execution and delivery of the PSA; 4) the disclosures and the warranty deed; and 5) the parties' post-closing conduct up until February 17, 2012 when Greenheart first asserted an interest in the Water Rights. At trial, testimony and exhibits were introduced that substantiated these allegations. The District Court entered findings and concluded the evidence established that Greenheart should be precluded by quasi-estoppel and waiver from asserting ownership of the Water Rights. R. Vol., II, p. 533.

Specifically, the District Court concluded that Greenheart is: 1) now taking a different position in claiming ownership of the water rights than she did when she disclaimed any interest in them in 2007 and again in 2009; 2) gained a substantial tax advantage over the years in doing so; and 3) caused a disadvantage to the Browns, who incurred legal expenses and took other efforts to sell the Water Rights in the belief there was no adverse claim to them, thereby inducing the Browns to change positions. The District Court also concluded that it would be

unconscionable to allow Greenheart to now maintain that the general appurtenances clause in the warranty deed had the effect of conveying water rights that Greenheart consistently asserted were not conveyed to her. Allowing Greenheart to do so would give her a windfall that was never intended by the parties "*at the time of their contract.*" R. Vol. II, p. 533-34 (emphasis added).

Greenheart has not challenged these findings and conclusions. As such, unless Count Two of the Brown's Complaint was time-barred, this Court should affirm the *Final Judgment* on the basis of quasi-estoppel and waiver, and need not reach the issue of whether the District Court erred in allowing the case to go to trial on the issue of mutual mistake.

## III. THE BROWNS' QUIET TITLE ACTION WAS NOT TIME-BARRED.

Greenheart argues that the Browns' quiet title action is barred by the four-year statute of limitations of Idaho Code § 5-224 (catch-all statute) and the three year statute of limitations of Idaho Code § 5-218 (fraud or mistake). Under either of these statutes, the clock begins to run when the cause of action accrues. Under either statute, the Browns' quiet title action accrued in February of 2012. Accordingly, the Browns' Complaint was not barred.

### A. The Brown's quiet title action accrued when Greenheart filed a Claim to the Water Rights with IDWR.

The Brown's action is to quiet title, and was brought pursuant to Idaho Code § 6-401, *et. seq.*, R. Vol. I, p. 12. I.C. § 6-401 provides that "[a]n action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for

the purpose of determining such adverse claim . . . ."[3] Applying the adverse claim standard of this statute, the District Court correctly held that the Browns' cause of action accrued, and the applicable statute of limitations began to run, on February 17, 2012 when Greenheart first claimed an interest in the Water Rights adverse to the Browns by filing a Notice of Claim of Ownership with IDWR. R. Vol. I, pp. 371-72.

The District Court found that it was not the Browns' intent to convey the property with water rights. Rather, Greenheart's intent was to purchase "dry" land. R. Vol. III, p. 551. After closing, Greenheart represented to Elmore County and the Browns that she knew she purchased the Greenheart Property as "dry" land *without* water rights.

Specifically, she represented to the Elmore County Board of Equalization that "at the time of the purchase, [she] also was very aware that the parcel is dry grazing only due to lack of an irrigation system and no water rights." Plaintiffs' Trial Exhibit 28. And she solicited Jay Brown's assistance in June of 2007 in representing to the County that the Greenheart Property had no water right, was not irrigated and would not be irrigated unless Greenheart purchased a water right for it. Plaintiffs' Exhibit 16. Two years later, Greenheart wrote to the Elmore County Assessor to reiterate "[a]gain, at the time of the purchase, I also was very aware that the parcel is dry grazing only due to lack of an irrigation system and no water rights." Plaintiffs' Exhibit 28 (emphasis added). Moreover, Greenheart represented in a Dry Land Grazing Lease she offered to the Browns that the Greenheart Property was "Category 5 Dry Grazing of 59.318

[3] The omitted proviso to I.C. § 6-401 concerning adjudication of water rights in a general adjudication under Title 42, Chapter 14 does not apply to the instant case or Water Rights.

Acres" and leased to the Browns for "dry grazing" only. This Lease remained in effect until January 31, 2012.

Thus, during the five years following closing, Greenheart repeatedly, consistently, and affirmatively disclaimed any interest in the Water Rights. The first time Greenheart claimed any interest in the Water Rights was when she filed a February 17, 2012 Notice of Change of Ownership with IDWR, claiming ownership of a portion of the Water Rights by virtue of the January, 2007 warranty deed. The Browns brought their quiet title action seven weeks later on April 5, 2012, R. Vol. I, p. 11, well within the four-year limit of I.C. § 5-224. Because Greenheart's statute of limitations defense fails as to the Browns' quiet title action, this appeal should be dismissed and/or the Court should affirm the *Final Judgment*.

### B. To the extent that their action is based on a mutual mistake in the warranty deed, the Browns brought their claim well within three years of their discovery of the facts constituting the mistake.

The District Court's analysis concerning when the Browns' quiet title action accrued (i.e, when Greenhearts first asserted an adverse claim to the Water Rights), is equally applicable to the Browns' cause of action stated in Count One of the Complaint. Greenheart argues that the three-year statute of limitations of Idaho Code § 5-218(4) should apply to Count One because that statute deals with claims based on fraud or mistake. I.C. § 5-218(4) contains the proviso that in the case of fraud or mistake the cause of action "shall not have accrued until the discovery by the aggrieved party, of the facts constituting the fraud or mistake."

This Court has held that where discovery of a cause of action commences the statute of limitations, the date of discovery is a fact question for the trier of fact, unless there is no evidence

creating a question of fact. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991); *see also Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 826 P.2d 1322 (1992) (ordinarily what constitutes the exercise of reasonable diligence to discover fraud so as to affect the time when the statute of limitations begins to run is a question of fact).

Greenheart argues that the Browns' cause of action accrued the moment the warranty deed was executed by the Browns—in other words, the very act constituting the mistake is sufficient notice of the mistake that would be apparent to any person exercising reasonable diligence.[4] Appellant's *Opening Brief* at 21.

The District Court addressed this argument, and correctly recognized that the issue of due diligence as it relates to when a party should have known of the alleged mistake in a deed is a question of fact that has little, if any, relation to date on which the deed was recorded. R. Vol. III, p. 557-58. The Court applied *Aiken v. Gill*, 108 Idaho 900, 702 P.2d 1360 (1985) to the circumstances concerning the Brown's diligence in discovering the mistake in using the title company's form deed.

In *Aiken*, this Court held that examination of the circumstances concerning the grantor's due diligence in discovering the mistake in the deed was a question of fact for the trial court on remand. *Id.*, 108 Idaho 901, 702 P.2d 1361. For guidance on remand, the Court also noted that

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[4] The irony of this argument seems to be lost on Greenheart, who holds four advanced degrees (including a masters in teaching and a doctorate in education), owns a home in Japan, two properties in Alaska, two properties in Nevada and two properties in Idaho, who declined to inspect the property before making an offer, and is capable of drafting her own dry grazing lease. R. Vol. III, pp. 540, 541-542,548.

> the recordation of the 1976-78 deeds has no bearing on the question of due diligence. When deeds are recorded, constructive knowledge of their contents is imparted to "subsequent purchasers or encumbrancers." I.C. 55-811. In any event, such constructive knowledge can be no greater than the seller's actual knowledge when they signed and delivered the deeds.

*Id.*

Here, The District Court concluded that "at the time of the Purchase and Sale Agreement, the Browns intended to sell 80 [sic] acres of land without its proportionate appurtenant Water Rights and Ms. Greenheart intended to purchase 80 [sic] acres of 'dry' land without appurtenant Water Rights other than an existing well on the property or the ability to drill a well." R. Vol. III, p. 545. The District Court further found that nothing in the PSA or warranty deed would reasonably put the Browns *or Greenheart* on notice that use of the general appurtenancy clause would convey water rights that neither party intended would be conveyed. R. Vol. III, p. 556. Inasmuch as they each relied on a licensed realtor in the purchase and sale, and on the title company in the preparation of the deed, neither party could be deemed negligent, to have failed to exercise due diligence or to have "attach[ed] the weighty legal significance to three words 'with their appurtenances' that these words actually carry." R. Vol. III, pp. 556-57.

Consequently, the District Court found that in executing the warranty deed, the Browns had no actual knowledge that it mistakenly conveyed portions of the Water Rights, and its execution was not a mistake that could have then been discovered with the exercise of due diligence so as to have started the three year statute of limitations under I.C. § 5-218(4). R. Vol. III, p. 557-58. The District Court found that "[i]n the evidence before the court, the discovery of

the facts constituting the mistake would have been during Mr. Brown's conversation with [an attorney] about the legal effect of the 'with their appurtenances' language in the deed in 2012." R. Vol. III, p. 559 (emphasis added).

Based on the evidence, and applying the correct accrual standard under I.C. § 6-401, I.C. § 5-218 or I.C. § 5-224, the District Court held the statute of limitations began to run in early to mid-February of 2012, which was approximately two months before this action was filed. For the foregoing reasons, the District Court's judgment quieting title to the Water Rights in the Browns must be affirmed.

## IV. THE DISTRICT COURT'S DETERMINATION THAT THE BROWNS WERE NOT NEGLIGENT SHOULD BE AFFIRMED.

For the first time in this case, Greenheart argues that Browns were barred from relying on mistake to reform the deed because they were negligent. *Opening Brief* at 25. This argument must fail because Greenheart never raised this issue below, and in any event, she has not demonstrated that the District Court's finding that the Browns were not negligent is clearly erroneous.

### A. Greenheart's argument that the Browns were barred from relying on mistake to reform the deed was not raised below.

Greenheart argues that the District Court should have found that the Browns' claim and relief based on mistake was barred because the Browns were negligent in not discovering the mistake. This is the first time Greenheart has raised this issue. The only instance below where Greenheart ever used the word "negligence" was in a requested finding of fact 27. *Defendant's First Amended Proposed Findings of Fact and Conclusions of Law,* R. Vol. II, p. 502 ("Jay and

Christine Brown were negligent in reviewing the Warranty Deed"). Nowhere else in Greenheart's proposed findings and conclusion or elsewhere in the record does she raise the issue of the Browns' negligence or what legal effect she believed the Court should give to the proposed negligence finding. Rather, in the "Relief" section of her *Proposed Findings and Conclusions* Greenheart states only the following:

> Without waiving its objections raised in its motion in limine and motion for reconsideration that mistake was not plead, Defendant Greenheart asks this Court to conclude that the Brown's [sic] lawsuit on the issue of mutual mistake is untimely and therefore enter an order dismissing the lawsuit. If this matter is not dismissed on statute of limitations grounds, Greenheart asks this Court to enter an order finding that the Browns have not proven the elements of mutual mistake or the application of any equitable theories of promissory and quasi estoppel.

R. Vol. II, p. 509 (emphasis added). In other words, Greenheart maintained only that the Browns' claims were time-barred by statutes of limitations or were not proven by the evidence. Greenheart never asserted that the ability to litigate the issue of mistake was precluded outright because the Browns were negligent. Nevertheless, responding to the proposed finding of fact, the District Court held that the issue before the court with respect to Greenheart's statute of limitations defense was not one of negligence "but rather whether the Browns could have discovered the mistake in the exercise of due diligence." R. Vol. III, p. 557.

To properly raise an issue on appeal, there must be either an adverse ruling by the court below or the issue must have been raised in the court below. An issue cannot be raised for the first time on appeal. *Bank of Commerce v. Jefferson Enterprises, LLC*, 154 Idaho 824, 303 P.3d 183 (2013). The District Court's refusal to adopt the proposed negligence finding should not be

considered an "adverse ruling" as contemplated by *Bank of Commerce*, however. Greenheart never asked the District Court to rule that negligence barred the Browns from litigating the issue of mutual mistake. Greenheart also never asked the District Court to rule that negligence had any effect on the litigation—only that the Court rule the Browns' claims were untimely and unproven. Had Greenheart done so, the District Court (and the Browns) would have had an opportunity to address the issue then, which would in turn provide some basis for review on appeal.

Because the issue was not raised below, Greenheart should not be able to litigate here the issue of "whether the Browns' negligence barred them from relying on mistake to reform the Warranty Deed at all." As to the issue of timeliness, the District Court correctly perceived that the issue presented went to the question of when the mistake could have been discovered in the context of the Browns' due diligence. R. Vol. III, p. 557.

### B. Greenheart has not shown that the District Court's determination that the Browns were not negligent is clearly erroneous.

Consistent with the issue as presented by I.C. § 5-218(4) (i.e, when did the Browns' claim based on mutual mistake accrue?) the District Court found that the mistake claim accrued when the Browns consulted with their legal counsel in February 2012 concerning the Browns' contemplated sale of the Water Rights to the City of Mountain Home. The Court determined that the Browns were not negligent, citing to evidence in the record that supported its finding. R. Vol. III, p. 557.

In particular, the Court found that the Browns were not negligent because they obtained and relied on a licensed real estate agent to assist in the sale and a title company to assist in preparation of documents. *Id.* As is the case in determining whether a party acted with due diligence, the issue of negligence is a question of fact, and the trial court's determination here should not be set aside unless it is clearly erroneous. *Simmons v. Trowbridge*, 69 Idaho 79, 83, 202 P.2d 1085 (1949) ("All questions of fact in this state, whether negligence, contributory negligence or gross negligence are for the jury"); *Burgess v. Salmon River Canal Co.*, 119 Idaho 299, 805 P.2d 1233 (1991) (determination and apportionment of negligence is for trier of fact and will not be set aside if supported by competent and substantial evidence); *Vanderwal v. Albar, Inc.*, 154 Idaho 816, 821, 303 P.3d 175, 180 (2013) (trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous and court's factual findings are not clearly erroneous if they are supported by substantial and competent evidence).

Greenheart has not identified facts in the record that would warrant reversal on this issue to the extent it has been preserved for review by being properly raised below.

## V. THE ISSUE OF MISTAKE WAS PROPERLY BEFORE THE COURT

Greenheart objects to having to litigate the issue of mistake, arguing that it was not properly pled. Greenheart's arguments are not supported by the applicable Idaho Rules of Civil Procedure, the record or the District Court's findings.

### A. The District Court did not abuse its discretion in construing the pleadings liberally to include the issue of mutual mistake.

Idaho's rules of procedure merely require pleadings to contain simple, concise and direct averments, and they are to be liberally construed by the trial court to do substantial justice.

I.R.C.P. 8(e)(1) and (f). Under this liberal notice pleading standard, the "courts should make every intendment to sustain a complaint that contains a concise statement of the facts constituting the cause of action and a demand for relief." *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 751, 274 P.3d 1256, 1266 (2012); *Brown v. City of Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010) (liberal notice pleading standard is intended to see justice done and prevent dismissal of a valid claim for a mere technical failing).[5] As to pleading certain matters, including fraud or mistake, Rule 9(b) merely requires that "the circumstances" constituting mistake be stated with particularity. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005) ("Fraud must be pleaded with particularity. That is, the alleging party must specify what factual circumstances constituted the fraud").

Applying the above standard for I.R.C.P. 8(e)(1) and (f), the District Court here found that the pleadings "raise the issue of mistake, which would permit extrinsic evidence to be considered." R. Vol. II, p. 375. In fact, in ruling on the Brown's *Motion to Amend* their *Complaint*, filed by the Browns in advance of trial to address Greenheart's alleged technical infirmity, Judge Norton denied the Browns' *Motion* holding that

> this is a notice pleading state. To that extent, I think the party certainly was on notice of what they were claiming in their claims, so I do find that it has been plead with enough particularity in this particular case in the declaratory judgment state to put the parties on notice that mistake is

[5] Greenheart's reliance on *AMCO Insurance Co. v. Tri-Spur Inv. Co*, 140 Idaho 733, 101 P.3d 226 (2004) is misplaced. *AMCO*, and the cases cited therein, deal with the standard applicable to an insurance company's duty to defend when a complaint does not allege a potential for liability that is contractually covered by the insured's policy. These insurance defense cases do not override the traditionally liberal rules governing notice pleading or the amendment of pleadings under I.R.C.P. 15(a) and (b).

> an issue. . . [a]s it relates to the motion to amend the [complaint] . . . if all you're doing is putting the heading "mistake" on it, you don't need to do that for the court's purpose. This is not a jury trial. The court has certainly read the pleading and is able to derive what has been pled.

Tr. p. 55, l. 15-22; p. 56, l. 20-p. 57, l. 4. Indeed, at the summary judgment stage, the District Court found that *both* parties had raised the issue of mistake in their pleadings.[6] For these reasons, the District Court also denied Greenheart's *Motion in Limine* and *Motion to Strike* the Browns' offered evidence showing the parties' actual intent concerning water rights. Greenheart has not shown how the District Court abused its discretion in construing the pleadings or that Greenheart was surprised or prejudiced in her defense on the merits as a result. *See Loose v. Loose*, 91 Idaho 77, 79, 415 P.2d 720, 722 (1966) (If a party can show prejudice by pointing to evidence it would have otherwise introduced or arguments it would have otherwise made, then that party may complain about the district court's finding based on an unpled theory).

### B. Allowing the issue of mistake to be tried based on the original pleadings produced the same result as if the District Court had allowed an amendment of the pleadings under I.R.C.P. 15(b)

Greenheart also asserts that the issue of mutual mistake was not tried with her express or implied consent, suggesting this somehow would be a bar to this issue and the relevant evidence at trial. This argument misreads Rule 15(b).

Under Rule 15(b), the trial court shall freely allow an amendment at any time, even after judgment, *and regardless of an express objection to admission of evidence going to the issue,*

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[6] "While this deed appears unambiguous on its face, the matters presented by both sides in support of the motions for summary judgment raise the issue of whether there was a mistake, which is a question of fact that precludes summary judgment." *Order on Cross-Motions for Summary Judgment,* R. Vol. II, p. 375 (emphasis added).

where presentation of the merits is promoted and there is no prejudice to the objecting party's ability to defend. I.R.C.P. 15(b) (where evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, amendment shall be freely allowed when the presentation of the merits will be subserved and objecting party fails to satisfy the court that admission would prejudice the party in maintaining an action or defense on the merits).

Here, the District Court would have been well within its discretion to grant the Browns' precautionary *Motion to Amend*, just as it could have allowed a motion to amend after trial over Greenheart's objection. Instead, the District Court determined any amendment was superfluous since both parties were well aware of the issue in advance of trial as demonstrated by their pleadings and evidence. R. Vol. II, p. 375.

As such, it is difficult to conceive how the District Court's denial of Greenheart's *Motion in Limine* and *Motion to Strike* upon finding the Complaint to be already sufficient under Rule 8 and Rule 9(b) would be substantially different from the District Court granting a motion to amend under Rule 15(b) to allow a technical addition to the Complaint that the District Court viewed unnecessary in any event. The broad discretionary choices available to the District Court under either Rules 8 and 9(b) or Rule 15 represent two sides of the same coin.[7] Greenheart has

[7] Liberal allowance of amendments under I.R.C.P. 15 in the interests of justice serves the same purpose as liberal construction of pleadings under I.R.C.P. 8—they allow the best chance for each claim to be determined in the merits rather than on a procedural technicality, and they relegate pleadings to the limited role of providing the parties with notice of the nature of the pleader's claim and the facts that have been called into questions. *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986).

not shown any abuse of that discretion or any prejudice to her. Her appeal of the decision below allowing trial of the mistake issue should be denied.

Over her objection or not, the issue of mistake was fully tried and Greenheart should not be permitted to prevail on her technical procedural argument. *See Anderson-Blake, Inc. v. Los Caballeros, LTD*, 120 Idaho 660, 818 P.2d 775 (1991) (declining to reverse district court's finding of misrepresentation on procedural technicality where the issue of misrepresentation was fully tried by the parties and objecting party had notice of the facts and circumstances surrounding misrepresentation claim).

## VI. WHETHER THE PSA WAS AMBIGUOUS IS IMMATERIAL GIVEN THE SCOPE OF THE DISTRICT COURT'S INQUIRY ON THE ISSUE OF MUTUAL MISTAKE.

Greenheart's argument that the trial court erred by not finding that the PSA unambiguously indicated an intent to convey the Greenheart Property with water rights is without merit, and would not affect the outcome of this case, even if correct.

Once the issue of mistake was identified and tried to the District Court, all of the evidence introduced bearing on what the parties intended would be conveyed by the deed became relevant and subject to review the District Court. This included the realtor's listing agreement, evidence showing the land was desert and had not been irrigated for at least twenty years, statements made to and by the real estate agent, and of course, the parties' PSA. After reviewing all this evidence, and giving due consideration to the witnesses' credibility concerning what they understood was being bought and sold, the Court found the parties understood and

intended that no water rights were being conveyed. That finding is supported by substantial evidence, which includes a PSA.

In looking within the four corners of the PSA, which is a printed form vacant land sale agreement, the Court deemed it to be ambiguous with respect to the parties' intent concerning water rights. R. Vol. III, p. 544. Since the Court found the PSA ambiguous, it also found to be relevant extrinsic evidence concerning the parties' intent, including evidence that impeached Greenheart's statement that she did not understand in 2007 that she did not have water rights. *Id.*

The Browns argued below that taken as a whole, the PSA unambiguously indicated no water rights were included in the sale—in every section where water or rights were addressed the parties indicated "N/A" or left the section blank. In looking solely at any particular section of the form agreement, (as Greenheart does), some are admittedly inartfully drafted.[8] The District Court found both parties' interpretations were reasonable, and therefore concluded the PSA was ambiguous. R. Vol. III, p. 544. Because that conclusion involves a question of law, *Knipe Land Company v. Robertson*, 151 Idaho 449, 259 P.3d 595 (2011), it is subject to free review by this Court, and the Browns can only invite this Court to do so. They expect and urge that this Court's conclusion must either be agreement with the District Court or the Browns. The PSA cannot be read to unambiguously indicate an intent to convey water rights.

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[8] *See e.g.,* Section 16's use of the word "herein," which according to *Black's Law Dictionary* 795 (9th ed. 2009) ("herein" is inherently ambiguous"), and its use of a colon which anticipates a listing of particulars will follow (i.e., a listing of the water rights that are appurtenant and will be included in the sale).

But regardless of whether the PSA was ambiguous, the District Court clearly was going to, and did, look at extrinsic evidence going to the issue of the parties' mutual intent and whether the warranty deed mistakenly subverted that intent. Given that the PSA seemed relatively unhelpful in this investigation, the District Court reviewed the *other* substantial, credible evidence presented at trial and concluded there had been a mutual mistake in using the form warranty deed. R. Vol. III, p. 545.

Greenheart incorrectly assumes that such evidence of mistake is inadmissible when a contract is unambiguous. That assumption runs afoul of this Court's ruling in *Bilbao v. Krettinger*, 91 Idaho 69, 415 P.2d 712 (1966). In *Bilbao*, the Court affirmed the decision of the trial court permitting extrinsic evidence of mutual mistake, despite the fact that the contract at issue was unambiguous. Specifically, the Court stated:

> Defendants cite to prior decisions by the court for the proposition that: (1) where a contract is clear and unambiguous the meaning must be determined from its contents alone; and (2) a contract must be given effect according to its terms and the court cannot substitute nor write a new contract for the parties. Such decisions are not pertinent to the present issue. A contract may be clear and unambiguous so far as it goes, and yet may not express the true agreement of the parties, by reason of mutual mistake.

*Id.* at 72, 415 P.2d at 715 (emphasis added).

The Court's statement in *Bilbao* effectively memorializes the inverse of the oft-cited statement that "Under the parol evidence rule, if the written agreement is complete on its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to

or detract from the terms of the written contract." *Lindberg v. Roseth*, 137 Idaho 222, 228, 46 P.3d 518, 524 (2002) (emphasis added).

The rule that evidence of mistake is admissible to assail a written document that is unambiguous makes sense. If the case were otherwise, a party could never offer evidence of mistake where the mistake is one of the legal meaning of an otherwise unambiguous term or is a latent mistake. On this issue, the Court's comments in *Bilbao* are, again, instructive:

> The best-considered modern cases recognize that the main object of equitable jurisdiction should be to effectuate the intention of the parties to the instrument, and that any mistake made by them which would defeat such intention should be corrected in equity, irrespective of the question whether the mistake is one of law or of fact.

*Bilbao*, 91 Idaho at 73, 415 P.2d at 716.

Here, the trial court could consider evidence of mistake regardless of whether the PSA was unambiguous. Indeed, the trial court had already concluded that under *Koon v. Empey, supra*, the warranty deed appeared to be unambiguous—Judge Norton therefore looked to the PSA as part of her review of the evidence going to the parties' intent to determine whether there was a mutual mistake. Thus, if this Court determines that Greenheart does not prevail on the issue of whether mistake was properly plead and tried, there is no reason to address the argued ambiguity of the PSA. Ambiguous or not, the District Court could consider evidence of mistake and its findings on that issue are supported by substantial and competent evidence.

## VII. THE DISTRICT COURT'S DETERMINATION THAT THE BROWNS ARE ENTITLED TO THEIR ATTORNEY FEES UNDER I.C. § 12-120(3) IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

Greenheart challenges the District Court's finding that the purchase and sale of the Greenheart Property was a commercial transaction requiring an award of attorney fees to the Browns as the prevailing party under I.R.C.P. 54(e)(1) and I.C. § 12-120(3). Under I.C. § 12-120(3) a prevailing party is entitled to its attorney fees in any civil action to recover on a commercial transaction, unless otherwise provided by law. "Commercial transaction" is defined to include "all transactions except for personal or household purposes." *Id.* The commercial transaction must constitute the gravamen of the lawsuit and be integral to the claim. *Brower v. DuPont De Nemours and Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990). Each party must enter the transaction for a commercial purpose. *Carrillo v. Boise Tire Co., Inc.,* 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012). The District Court correctly found based on the evidence that these requirements all were satisfied and attorney fees should be awarded to the Browns as the prevailing parties.

Greenheart argues that it was not established that she had a commercial purpose in buying the property, or that the Browns had a commercial purpose selling it. In essence, Greenheart challenges the District Court's findings as the trier of fact: "[i]n this case, the district court misconstrued the evidence regarding Greenheart's purpose/intentions for buying the property." *Opening Brief* at 28. To prevail on this argument, however, Greenheart must show that the District Court's findings are clearly erroneous. *Vanderwal v. Albar, Inc.*, 154 Idaho 816, 821, 303 P.3d 175, 180 (2013) ("A trial court's findings of fact will not be set aside on appeal

unless they are clearly erroneous. Factual findings are not clearly erroneous if they are supported by substantial and competent evidence, which is evidence that a reasonable trier of fact could accept and rely upon in determining that such facts have been proved") (internal citations omitted). Greenheart fails to carry this heavy burden here.

In urging that the District Court's findings of fact on this issue were not supported by substantial evidence, i.e., "misconstrued," Greenheart points to a brief and arguably vague colloquy between Browns' counsel and Greenheart as the only evidence bearing on her intent in contracting to purchase the sixty acres. *Opening Brief* at 29-30. Greenheart ignores the additional evidence considered, and findings made, by the District Court showing Greenheart's commercial intent:

- The gravamen of the lawsuit regarded the purchase and conveyance of land and appurtenant water rights;
- Greenheart told the real estate agent she was looking to purchase vacant land with low taxes;
- Greenheart never lived on the land after the purchase;
- Greenheart represented that at the time of her purchase she was aware that the land "was strictly for farming and that I had no way to build a residence;"
- at the time of purchase Greenheart was told and understood that the land was dry and the grass was good for cattle;
- Greenheart obtained a reclassification of the property as dry grazing land;
- the Greenheart Property was just one of seven properties Greenheart owned, including other properties in Japan, Alaska, Idaho and her residence in Nevada; and
- Greenheart leased the property back to the Browns for grazing.

R. Vol. III, p. 517-18.

The District Court found on the evidence, including Greenheart's testimony, that she wanted to invest in real estate in the Mountain Home area. R. Vol. III, p. 540. On the above facts and the inferences the court could make from considering what Greenheart did with the property after the purchase, the District Court found she did not purchase the land for household or personal purposes, but as an investment. R. Vol. III, p. 518. This determination is big because this Court has specifically held that where evidence showed that land was being purchased for investment purposes, the trial court correctly found that the transaction was a "commercial transaction." *Cannon v. Perry*, 144 Idaho 728, 170 P.3d 393 (2007) (transaction between vendors and prospective purchasers for sale of real property was a commercial transaction for purposes of I.C. § 12-120(3) where evidence showed purchasers were buying property for investment purposes).

As to the Browns' purpose in selling the property, again after summarizing the evidence introduced at trial on the issue, the District Court found that:

> [i]n examining the overall purpose of the Plaintiffs in the facts at trial, they used the tract of land at issue in this case, its water rights, and the sale of the land for a commercial purpose . . . to [sic] ranching, farming and to derive income. The purpose of the sale of the sixty acres of land, when viewed in light of their other actions of leasing, contracting to sell, and selling other water rights and other portions of the land, was a commercial transaction.

R. Vol. III, p. 519 (ellipses in original).

The District Court correctly recognized the standards established by I.C. § 12-120(3) and this Court's decisions and applied them to the facts in the record. The trial judge's finding that a

commercial transaction was integral to the instant action is supported by substantial evidence and should be affirmed.

## VIII. THE BROWNS ARE ENTITLED TO AN AWARD OF ATTORNEY FEES UNDER THE ATTORNEY FEE PROVISION OF THE PSA.

In the alternative to requesting attorney fees pursuant to I.C. § 12-120(3), the Browns also asserted in their Complaint and Memorandum of Costs that they were entitled to an award of fees under their PSA with Greenheart. Because the District Court determined that the Browns were the prevailing parties and entitled to their attorney fees under I.C. § 12-120(3), the Court did not address the Browns' claim for attorney fees under the PSA. The Browns assert their right to attorney fees under the PSA as an additional issue on appeal and as an alternative ground for an award of their attorney fees below and on appeal.

Paragraph 9 of the PSA provides that:

> if either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.

Plaintiff's Exhibit 6 (emphasis added). There is no reasonable argument that the instant lawsuit is not in any way connected with the PSA. The PSA was an integral piece of evidence considered by the District Court to discern the parties' intent in the context of of estoppel, waiver and mistake. The warranty deed that is the subject of dispute here was contemplated by, and is clearly "connected with", the PSA. As prevailing parties, the Browns are entitled to their attorney fees under this contract provision.

An argument may be made that the attorney fee provision of the PSA was merged in the deed. The Browns are not aware of any Idaho decision specifically addressing whether an attorney fee provision in a contract survives performance of the contract or is merged in a deed. However, the reasoning of this Court in *Christiansen v. Intermountain Ass'n of Credit Men*, 46 Idaho 394, 267 P. 1074 (1928) and *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 414 P.2d 879 (1966) is applicable to the instant case and should permit the Browns' requested attorney fees here.

In *Christiansen*, the issue was whether a term in a land sale contract requiring the seller to furnish an abstract of title to the buyer became merged upon acceptance of the deed. After stating the general rule concerning merger, the Court outlined a well-recognized exception where the covenant in the contract does not relate to the conveyance, but is instead collateral to and independent of the conveyance. *Id.*, 46 Idaho at 398, 267 P. at 1075.

This Court considered the issue in more detail in *Jolley v. Idaho Securities, Inc.*, *supra*, where it quoted extensively from *Christiansen* and from *Continental Life Ins. Co. v. Smith*, 41 N.M. 82, 64 P.2d 377 (1946), concerning which contract terms are conclusively presumed to merge with acceptance of a deed: 1) those that inhere in the very subject-matter of the deed, such as title, possession, quantity, emblements of the land; 2) those carried into the deed and of the same effect; and 3) those of which the subject matter conflicts with the same subject matter in the deed. *Jolley*, 90 Idaho at 382-83, 414 P.2d 884-85. Where the contract stipulation is collateral to the subject matter of the deed, however, the court is to determine "whether the parties have intentionally surrendered or waived such stipulations. If such intention appears in

the deed, it is decisive, if not, then resort may be had to other evidence." *Id.* (quoting from *Continental Life, supra).*

Although Idaho has not specifically addressed whether an attorney fee provision in a real estate contract is merged with acceptance of a deed, other courts have determined an attorney fee provision is collateral and does not merge. In *Jensen v. Miller,* 570 P. 375 (Or. 1977), a case involving mutual mistake in a deed resulting from a survey error, the court held that the attorney fees provision contained in the contract (but not in the deed) was effective because "contractual provisions which are not embodied in the deed are superseded only if the parties intend to surrender them." *See also Kinzler v. Pope*, 791 N.W.2d 427 (Iowa App. 2010) ("[t]he attorney fee provision states it shall apply to 'any action or proceeding relevant to this contract . . . ' accordingly, some of the contract terms survive as a collateral matter not subject to the merger doctrine, it is reasonable to conclude the attorneys' fee provision equally survives to such actions or proceedings relating to the contract."); *Coe v. Crady Davis Corporation,* 60 P.3d 794 (Colo. App. 2002)(attorney fee shifting provision did not relate to title, quantity, possession, or emblements of the land, which are items expected in the deed, and therefore was collateral to the deed and did not merge with the deed); *Lasher v. Paxton*, 956 P.2d 647 (Colo. App. 1998)(holding attorney fee provision in a real estate contract did not merge into the deed at closing on same basis and because the contract involved certain continuing obligations after closing); *Terrydale Liquidating Trust v. Barness,* 645 F. Supp. 920 (S.D.N.Y. 1986)(applying Colorado law to conclude that attorneys' fee provision in real estate sales contract did not merge because it was collateral and not necessarily satisfied by execution and delivery of the deed).

The attorney fee provision in the parties' PSA here must be deemed to be collateral to the subject matter of the deed—it is not related to title, possession, etc. of the land; nor is it carried forward in or in conflict with the deed. The attorney fee provision reflects the parties' intent that if an action is brought "in any way connected" with the PSA, then the prevailing party should receive their attorney fees. Nothing in record would indicate that either party intentionally surrendered or waived their right to attorney fees if a dispute arose in connection with the purchase and sale of the property before or after acceptance of the deed.

Greenheart could be expected to argue, as she did to the District Court, that seeking fees under the PSA attorney fee provision is barred by the five-year statute of limitations for contract actions under Idaho Code § 5-216. Setting aside the obvious response that a request for fees is not a cause of action, as argued above, the attorney fee provision survived and was not merged by delivery of the warranty deed. As such, "the contract is kept alive, and an action on it may be brought in case of its breach, independent of any possible recovery on the warranties of the deed." *Jolley*, 90 Idaho at 384, 414 P.2d at 885.

Paragraph 9 of the PSA states that the prevailing party is entitled to their fees and costs in "any arbitration or legal action or proceedings" connected with the PSA, not just an action brought within a five years of the date of the contract or associated deed. The right to seek attorney fees under the PSA must be deemed to remain alive and accrue at the point a party is determined to be entitled to fees as a prevailing party in an action connected with the PSA.

For the foregoing reasons, the Browns are entitled to an award of their attorney fees as the prevailing parties in the case below and on appeal by virtue of the attorney fee provision of

their PSA, which survived closing and acceptance of the warranty deed. This right to attorney fees on the contract is independent of and an alternative to the Browns' entitlement to attorney fees under I.C. § 12-120(3).

## IX. THE BROWNS ARE ENTITLED TO THEIR ATTORNEY FEES AND COSTS ON APPEAL

The Browns incorporate here by reference the arguments and authority contained in Sections VII and VIII above, which present the applicable law and facts concerning their entitlement to an award of attorney fees in this action. Specifically, I.C. § 12-120(3) provides that the prevailing party in an action to recover on a commercial transaction shall be awarded their attorney fees. As argued in Section VII above, the District Court correctly found that the gravamen of the Browns' action was the sale of land, and that both parties entered into the transaction for commercial purposes and not for personal or household purposes. Greenheart purchased the property for investment and the Browns sold the property as part of their ongoing farming and ranching operation. To the extent the Browns prevail on appeal, they are entitled to an award by this Court of their attorney fees on appeal under I.C. § 12-120(3) and Idaho Appellate Rule 41.

In the alternative, as prevailing parties, the Browns should be awarded their attorney fees and costs on appeal pursuant to the attorney fee provision in Paragraph 9 of the PSA. On its face, this attorney fee provision is applicable to any action connected with the agreement, and covers fees at trial and on appeal. Being a collateral stipulation or covenant, it did not merge with the delivery and acceptance of the warranty deed.

## CONCLUSION

The Browns brought this action upon discovering that Greenheart sought to exercise control over Water Rights that neither party intended to include in the conveyance of the sixty acres of desert land. The District Court found that the Browns acted reasonably and diligently in the execution of the deed in 2007 and in bringing their claim promptly upon discovery of the mistake and Greenheart's first making of adverse claim to the Water Rights in 2012. Because of the repeated and consistent representations that Greenheart made to Elmore County officials and the Browns that she knew she purchased the land as dry land without water rights, and the Browns' understandable reliance on those representations, Greenheart is estopped from claiming any interest in the Water Rights and has waived her right to assert any such ownership.

The District Court construed the line of Idaho decisions dealing with the import of general appurtenancy language in a deed to give effect to all of those decisions despite the arguable inconsistency identified by the District Court. *Order on Cross Motions for Summary Judgment*; R. Vol. II, p. 373-75. Those cases stand for the general rule that a deed containing a general appurtenancy clause without mentioning water rights operates to convey the land with any appurtenant water rights unless it can be clearly shown that it was known to both parties that water rights were not intended to be conveyed. *Irish v. Russell, supra.* The District Court construed the *Russell* holding with the holding in *Koon v. Empey, supra,* as allowing extrinsic evidence to show fraud or mistake (i.e., that it was known to both parties that water rights were not intended to be conveyed), and found that the pleadings alleged facts, which if proven could establish a mutual mistake. Following a trial on that issue, the District Court found that the

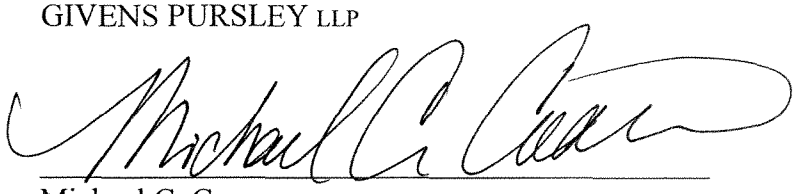
Browns met their burden of proving mutual mistake.

The District Court's findings that mistake had been pled and proven, that the Browns were not negligent but rather exercised due diligence and timely brought their claims, and that the land sale was a commercial transaction are all within the province of the trial court to determine as the trier of fact and the holder of broad discretion to do substantial justice. Greenheart has not pointed to any evidence in the record sufficient for this Court to find the District Court's findings were clearly erroneous or that it abused its discretion.

The *Final Judgment* should be affirmed in all respects and the Browns should be awarded their attorney fees and costs both below and on appeal.

Respectfully submitted this 9th day of January, 2014.

GIVENS PURSLEY LLP



Michael C. Creamer
Attorneys for Respondents Jay and Christine Brown

## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2014, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

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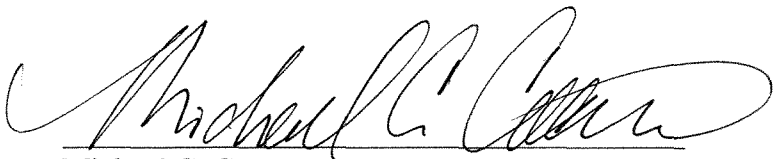

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